

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WILLIAM CHILDS)	
Claimant)	
)	
VS.)	
)	
SBS ENTERPRISES)	
Respondent)	Docket No. 268,987
)	
AND)	
)	
UNINSURED)	
Insurance Carrier)	
)	
AND/OR)	
)	
WORKERS' COMPENSATION FUND)	

ORDER

Claimant requests review of a preliminary hearing Order entered by Administrative Law Judge John D. Clark on December 12, 2001.

ISSUES

The Administrative Law Judge found claimant was a self-employed independent contractor not covered by the Workers Compensation Act and on that basis denied the application for preliminary benefits.

Claimant contends the Judge erred. Claimant argues the facts establish that he was an employee because respondent had the right to control the manner and method of claimant's work. Conversely, respondent and the Workers' Compensation Fund contend the Judge's findings are well supported by the evidence and should be affirmed.

The only issue before the Board on this appeal is whether claimant was an employee of respondent or an independent contractor at the time of the accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the arguments contained in the briefs of the parties, the Board concludes the Administrative Law Judge's preliminary hearing Order should be affirmed.

The respondent is a service which arranges for delivery of vehicles, such as buses and limousines, from the manufacturer to the purchaser. Respondent maintains a list of drivers, designated independent contractors, to call to see if the driver will pick up the vehicle and take it to its destination. Drivers are paid a specified amount based on the respondent's determination of the mileage between where the vehicle is picked up and the destination.

The drivers enter into delivery contracts for each job. The contract specifically provides:

Driver is an independent contractor and is therefore responsible for his unemployment, social security and FICA taxes or any other governmentally required payments attributable to the operation of drivers business. The manner and method of performance is within the Driver's discretion. Driver shall maintain his/her own medical and personal liability insurance as required by I.C.C.

The drivers are paid only to get the vehicle from the location where it is picked up to the delivery destination. The drivers pay all expenses to get to the pick up location and further arrange and pay for their own transportation back after delivery of the vehicle.

On May 31, 2001, claimant and two other drivers had made deliveries in St. Louis and were headed back to the Thomas Bus Plant in Thomasville, North Carolina to pick up some buses for delivery in California. Claimant was a passenger in a car being driven by Mr. Chan. Claimant was rendered unconscious and injured when the car collided with a bridge abutment.

The Administrative Law Judge found the preliminary hearing record failed to establish an employee/employer relationship existed between claimant and respondent on the date of claimant's accident. But the evidence does support a finding that claimant was an independent contractor of the respondent. The relevant facts are set out in the Administrative Law Judge's preliminary hearing Order and it is not necessary to repeat those in this Order. Therefore, the Board adopts the Administrative Law Judge's findings and conclusions as if specifically set forth in this Order.

The primary test utilized in Kansas to determine whether an employee/employer relationship exists is whether the employer has the right of control and supervision of the work of the employee. This involves the right to direct the manner in which the work is

performed as well as the result which is to be accomplished. It is not the actual exercise of control, but the right to control which is determinative.¹

As found by the Administrative Law Judge, the Board finds the evidence contained in the preliminary hearing record, at this stage of the proceedings, supports the conclusion that respondent did not have the right of control over the claimant to establish an employee/employer relationship. This conclusion is supported by the fact that claimant and respondent entered into contracts for each delivery with the specific intent to create a relationship between respondent and claimant as an independent contractor and not an employee/employer relationship. Claimant was required to pay all of his trip expenses as well as providing his own transportation to return after delivery of the vehicle.

When respondent had a delivery job for claimant, the respondent provided claimant with the location of the vehicle, the identification of the vehicle, vehicle inspection paperwork, when to pick it up, when delivery was expected and the destination for the delivery of the vehicle. Respondent did give claimant a suggested route to use, but claimant also could use another route at his discretion.

Claimant was paid a lump sum predetermined by the miles from where the vehicle was picked up to the destination and not by the hour or by the week. Respondent paid claimant a gross amount per trip and made no deduction for federal or state taxes. At the end of the year, respondent provided claimant with a 1099 form representing the gross amount respondent had paid claimant for the year instead of an employee's W-2 form. Claimant filed a Schedule C which indicated he was self-employed in the business of delivering vehicles.

Lastly, claimant was not required to take every delivery offered by the respondent, but could, at his discretion, refuse or accept the offered delivery job. The Board finds that claimant, being under little or no supervision or control by respondent, and having only to be concerned with the final result, i.e., the delivery of the vehicle, was not an employee, but instead an independent contractor.

Claimant notes there was not a signed contract of delivery when the accident occurred and infers such fact alters the relationship between claimant and respondent. The respondent explained that the drivers, after making a delivery, would typically call to see if other jobs were available. If so, the driver would proceed to the pick up location, deliver the vehicle and then would sign the contract of delivery. The claimant and respondent had done the paperwork after some jobs were completed and, given the history of the parties, this fact does not alter an independent contractor relationship into an employee/employer relationship.

¹ McCubbin v. Walker, 256 Kan. 276, 886 P.2d 790 (1994); Falls v. Scott, 249 Kan. 54, 815 P.2d 1104 (1991); and Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated December 12, 2001, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2002.

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
 Kendall R. Cunningham, Attorney for Respondent
 Garry L. Howard, Attorney for Workers' Compensation Fund
 John D. Clark, Administrative Law Judge
 Philip S. Harness, Workers Compensation Director